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Extra Excel (M) Sdn Bhd v Chu Nyuk Tai

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–1434 OF 2009
LOW HOP BING, ABDUL WAHAB PATAIL AND AZAHAR MOHAMED JJCA
3 NOVEMBER 2014

C

Civil Procedure — Preliminary objection — Supplementary record of appeal — Supplementary record of appeal filed outside deadline — Defendant directed by Registrar of Court of Appeal to file supplementary record of appeal enclosing sealed order of High Court — Failure to comply with directive — Allegation that D *record of appeal defective — Whether appeal ought to be struck out*

This was the appellant's appeal ('the defendant') against the decision of the High Court in allowing the respondent's claim ('the plaintiff') against the E defendant. By virtue of a distributorship agreement ('the agreement'), the defendant appointed the plaintiff as the distributor of the defendant's product. The plaintiff received a letter of suspension from the defendant suspending the plaintiff for three months as it was alleged that the plaintiff had behaved unethically by engaging in price-cutting activities. Before the expiry of the F three months and without holding a due inquiry, the defendant terminated the plaintiff's services. The plaintiff sued the defendant, contending that her suspension was in breach of the agreement and further claimed for a declaration that the suspension was null and void; specific performance of the agreement; general damages including loss of earnings and damages for G wrongful publication of the suspension. The High Court allowed the plaintiff's claim except for the claim for bonus payments. In raising a preliminary objection, the plaintiff highlighted on the Registry of Court of Appeal's letter addressed jointly to both the plaintiff and the defendant. In the said letter, the defendant was directed by the Registrar of the Court of Appeal to file a H supplementary record of appeal enclosing the sealed order of the High Court. The plaintiff submitted that the defendant had failed to comply with the directive. The supplementary record of appeal was filed outside the deadline. It was therefore submitted that the record of appeal was defective and the appeal ought to be struck out.

I

Held, upholding the preliminary objection, striking out the appeal:

(1) Rule 18(4)(d) of the Rules of the Court of Appeal 1994 requires that the appeal record should include the sealed order of the High Court. Despite the plaintiff's notice, the defendant made no effort or attempt at all to

regularise the defective supplementary record of appeal by applying for leave to file out of time the said record. The failure on the part of the defendant to apply for leave was therefore inexcusable. The failure on the part of the defendant to apply for leave to regularise the record of appeal resulted in there being no sealed order of the High Court being filed. The sealed order of the High Court was the focus of the grounds of appeal and the submissions. It is a fundamental rule of justice that there is no uncertainty as to the order appealed from (see para 10).

(2) Although in the light of the new r 1A inserted by the Rules of the Court of Appeal (Amendment) 2002 PU(A) 196/2002 that 'In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein'. The distinction between an irregularity and a nullity would no longer apply, and *Capital Insurance Bhd v Kasim bin Mohd Ali* [2002] 1 MLJ 193 is no longer good law, the judicial consideration of the justice of the particular case warranting application of r 1A requires that an application, in this case, for leave to file out of time is made, so that the justice of the particular case could be addressed upon affidavits and not upon statements from the bar (see para 11).

(3) The plaintiff's preliminary objection was upheld. The record of appeal was defective; the appeal was not competent. On this ground alone this appeal was struck out (see para 12).

[Bahasa Malaysia summary

Ini adalah rayuan perayu ('defendan') terhadap keputusan Mahkamah Tinggi dalam membenarkan tuntutan responden ('plaintif') terhadap defendan. Mengikut perjanjian pengedaran ('perjanjian'), defendan melantik plaintif sebagai pengedar barangan defendan. Plaintif menerima surat penggantungan daripada defendan menggantung plaintif untuk tiga bulan kerana ia didakwa bahawa plaintif telah berkelakuan secara tidak beretika kerana terlibat dalam aktiviti-aktiviti pemotongan harga. Sebelum tamat tempoh tiga bulan dan tanpa mengadakan siasatan sewajarnya, defendan menamatkan perkhidmatan plaintif. Plaintif menyaman defendan, berhujah bahawa penggantungannya adalah memungkiri perjanjian tersebut dan selanjutnya menuntut untuk perisytiharan bahawa penggantungan adalah batal dan tak sah; pelaksanaan spesifik perjanjian; ganti rugi am termasuk kehilangan pendapatan dan ganti rugi untuk penerbitan penggantungan yang salah. Mahkamah Tinggi membenarkan tuntutan plaintif kecuali untuk tuntutan bagi bayaran bonus. Dalam membangkitkan bantahan awalan, plaintif menekankan ke atas surat Pejabat Pendaftaran Mahkamah Rayuan yang ditujukan bersama kepada kedua-dua plaintif dan defendan. Dalam surat tersebut, defendan diarahkan oleh Pendaftar Mahkamah Rayuan untuk memfailkan rekod rayuan tambahan dengan melampirkan perintah Mahkamah Tinggi yang dimeterai. Plaintif

berhujah bahawa defendan telah gagal untuk mematuhi arahan tersebut. Rekod rayuan tambahan difailkan di luar tarikh akhir. Oleh itu dihujahkan bahawa rekod rayuan adalah cacat dan rayuan patut dibatalkan.

Diputuskan, mengesahkan bantahan awalan, membatalkan rayuan:

(1) Kaedah 18(4)(d) Kaedah-Kaedah Mahkamah Rayuan 1994 mengkehendaki bahawa rekod rayuan memasukkan perintah Mahkamah Tinggi yang dimeterai. Meskipun terdapat notis plaintif, defendan tidak membuat apa-apa usaha untuk membetulkan rekod rayuan tambahan yang cacat tersebut dengan memohon izin untuk memfailkan di luar masa rekod tersebut. Kegagalan oleh pihak defendan untuk memohon untuk izin untuk membetulkan rekod rayuan mengakibatkan tidak terdapat perintah Mahkamah Tinggi yang dimeterai difailkan. Perintah Mahkamah Tinggi yang dimeterai adalah fokus alasan rayuan dan hujahan. Ia adalah peraturan keadilan asas bahawa tiada ketidakpastian terhadap perintah yang dirayu (lihat perenggan 10).

(2) Walaupun berdasarkan k 1A yang baru yang dimasukkan oleh Kaedah-Kaedah Mahkamah Rayuan (Pindaan) 2002 PU(A) 196/2002 bahawa 'In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein'. Perbezaan di antara ketaksekataan dan pembatalan tidak lagi digunapakai, dan kes *Capital Insurance Bhd v Kasim bin Mohd Ali* [2002] 1 MLJ 193 bukan lagi undang-undang betul, pertimbangan kehakiman terhadap keadilan sesuatu kes mewajarkan permohonan k 1A mengkehendaki bahawa permohonan, dalam kes ini, untuk izin memfailkan di luar masa dibuat, dengan itu keadilan sesuatu kes boleh ditimbangkan atas afidavit dan bukan atas pernyataan daripada majlis peguam (lihat perenggan 11).

(3) Bantahan awalan plaintif disahkan. Rekod rayuan adalah cacat; rayuan tidak kompeten. Atas alasan ini sahaja rayuan ini dibatalkan (lihat perenggan 12).]

Cases referred to

Capital Insurance Bhd v Kasim bin Mohd Ali [2000] 1 MLJ 193; [2000] 1 CLJ 269, CA (not folld)

Legislation referred to

Courts of Judicature Act 1964 s 42(1)
Rules of the Court of Appeal 1994 rr 1A, 18(4)(d)

Appeal from: Suit No K22–237 of 2006 (High Court, Kota Kinabalu)

Alexander HW Siew (Alex Siew & Co) for the appellant.
Lim Pitt Kong (PK Lim & Co) for the respondent.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This was Extra Excel (M) Sdn Bhd's appeal (the defendant in the High Court) against the decision of the High Court given on 22 June 2009 in allowing Chu Nyuk Tai's claim (the plaintiff in the High Court) against Extra Excel (M) Sdn Bhd.

[2] It would be convenient to describe the parties in this judgment as they appear in the High Court.

[3] When this appeal came up before us on 10 January 2012, learned counsel for the plaintiff raised a preliminary objection to the appeal. Upon hearing both counsel, we unanimously upheld the preliminary objection. Accordingly, we ordered that the defendant's appeal be struck out.

[4] We now give our reasons for so deciding.

[5] The brief facts of the case giving rise to this appeal are these. On 30 June 1997 by virtue of a distributorship agreement ('the agreement'), the defendant appointed the plaintiff as the distributor of the defendant's product. On 28 June 2006, the plaintiff received a letter of suspension from the defendant suspending the plaintiff for three months as it was alleged that the plaintiff had behaved unethically by engaging in price-cutting activities which was against the terms of the agreement. Before the expiry of the three months and without holding a due inquiry, the defendant terminated the plaintiff's services. The plaintiff sued the defendant, contending that her suspension was in breach of the agreement. The plaintiff claimed for a declaration that the suspension is null and void, specific performance of the agreement, general damages including loss of earnings and damages for wrongful publication of the suspension. After a full trial the High Court allowed the plaintiff's claim except for the claim for bonus payments. The High Court also ordered the defendant to pay the plaintiff RM2,000 as general damages for the plaintiff's loss of profits and RM50,000 as general damages for wrongful publication in the defendant's magazine.

[6] In raising the preliminary objection, learned counsel for the plaintiff brought to our attention the Registry of Court of Appeal's letter dated 1 December 2012 addressed jointly to both the solicitors for the plaintiff and the defendant pertaining to the appeal herein. The material part of the letter reads:

> MAHKAMAH RAYUAN RAYUAN SIVIL NO. S-02–1434–09
>
> (Mahkamah Tinggi Kota Kinabalu Guaman Sivil No.K-22–237–2006)
>
> Extra Excel [Malaysia] Sdn Bhd — Perayu
>
> Dan
>
> Chu Nyuk Tai — Responden
>
> Dengan segala hormatnya merujuk kepada perkara di atas.
>
> 2. Dengan ini dimaklumkan bahawa rayuan tersebut di atas telah ditetapkan untuk perbicaraan di hadapan Mahkamah Rayuan Malaysia di Kota Kinabalu, Sabah pada 10hb Januari 2012, jam 9.00 pagi.
>
> 3. Menurut rekod kami, Rekod Rayuan yang Peguam Perayu failkan tidak mengandungi Perintah Termeterai. Justeru itu, Peguam Perayu hendaklah memfailkan Rekod Rayuan Tambahan yang mengandungi Perintah Termeterai dalam tempoh dua (2) minggu dari tarikh penerimaan notis perbicaraan ini.
>
> 4. Sekiranya Rekod Rayuan Tambahan tersebut tidak difailkan dalam tempoh yang telah ditetapkan, rayuan perayu akan dikeluarkan dari senarai perbicaraan dan akan ditetapkan untuk pelupusan dalam panel yang sama.

[7] In the said letter, the defendant was directed by the Registrar of the Court of Appeal to file a supplementary record of appeal enclosing the sealed order of the High Court. Learned counsel for the plaintiff submitted that the plaintiff had failed to comply with the directive. The supplementary record of appeal was only filed on 30 December 2011, which was outside the deadline. He therefore submitted that the record of appeal was defective and the appeal ought to be struck out.

[8] In opposing the preliminary objection, learned counsel for the defendant contended that the non-compliance should be only treated as an irregularity and should not nullify the appeal.

[9] In addressing this issue, the important point to note is that on 9 January 2012, the plaintiff gave notice of preliminary objection to the defendant. The material part of the objection reads:

> 3. the appeal is not competent because:
>
> (a) subject to proof by the Appellant, the Appellant only filed the Supplementary Record of Appeal on or about 30 December 2011 containing the omitted signed

and sealed High Court Judgment dated 22 June 2009 after the expiry of 2 weeks from the date of receipt of the Notice of Hearing dated 01 December 2011. The Respondent's Advocates, Messrs P. K. Lim & Co received the said Notice of Hearing dated 01 December 2011 by fax on 02 December 2011 followed by post on 09 December 2011; and

(b) subject to 3(a) hereof, if the Objection is established, the Appellant made no attempt to apply for leave from the Court of Appeal to file or regularize the Supplemental Record of Appeal out of time containing the signed and sealed High Court Judgment dated 22 June 2009.

[10] Rule 18(4)(d) of the Rules of the Court of Appeal 1994 requires that the appeal record should include the sealed order of the High Court. Despite the plaintiff's notice, the defendant made no effort or attempt at all to regularise the defective supplementary record of appeal by applying for leave to file out of time the said record. The failure on the part of the defendant to apply for leave was therefore inexcusable. The failure on the part of the defendant to apply for leave to regularise the record of appeal resulted in there being no sealed order of the High Court being filed. The sealed order of the High Court is the focus of the grounds of appeal and the submissions thereon. It is a fundamental rule of justice that there is no uncertainty as to the order appealed from.

[11] Although in the light of the new r 1A inserted by the Rules of the Court of Appeal (Amendment) 2002 PU(A) 196 of 2002, *gazetted* 16 May 2002 and effective 17 May 2002, that 'In administering any of the Rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein', the distinction between an irregularity and a nullity no longer applies, and *Capital Insurance Bhd v Kasim bin Mohd Ali* [2000] 1 MLJ 193; [2000] 1 CLJ 269 is no longer good law, the judicial consideration of the justice of the particular case warranting application of r 1A requires that an application, in this case, for leave to file out of time is made, so that the justice of the particular case can be addressed upon affidavits and not upon statements from the bar.

[12] For reasons aforesaid, the plaintiff's preliminary objection was upheld. We held that the record of appeal was defective; the appeal was not competent. On this ground alone this appeal was struck out. We ordered that the deposit of RM500 be given to the plaintiff on account of costs.

[13] This judgment is prepared pursuant to s 42(1) of the Courts of Judicature Act 1964 as our learned brother Low Hop Bing JCA has since retired.

Preliminary objection upheld, appeal struck out.

Reported by Afiq Mohamad Noor